No. 4887

3

In the United States
Circuit Court of Appeals
For the Ninth Circuit

J. W. DUNFEE,

Appellant,

vs.

C. A. TERWILLIGER, on behalf of himself and all other stockholders of the ORLEANS MINING AND MILLING COMPANY, a corporation, similarly situated,

Appellees.

Appellees' Brief

FILED
OCT 1 1926
F. D. MONCKTON,
Clerk

H. R. COOKE
and
(COOKE & STODDARD ON BRIEF)
Attorneys for Appellees.

No. 4887

In the United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DUNFEE,

Appellant,

vs.

C. A. TERWILLIGER, on behalf of himself and all other stockholders of the ORLEANS MINING AND MILLING COMPANY, a corporation, similarly situated,

Appellees.

Appellees' Brief

STATEMENT

Appellant's Opening brief consists of 66 pages, 50 pages of which are devoted to an effort by appellant to show that the trial court erred in not finding the facts as appellant alleged them to be. The trial court found (Rec. pp. 345-348) the facts to be as alleged by appellee's Complaint with only two quali-

(NOTE—Use of bold-face type by way of emphasis in quotations is, in all cases, unless otherwise stated, our own.)

fications (Rec. p. 346) and neither of those are in anywise involved on this appeal. Twelve of appellant's seventeen specifications of error are to the point that the findings are contrary to the evidence. As we read appellant's Brief it is nowhere asserted or contended that the conclusions of the trial court were not supported by competent evidence, but that the contention now made, in effect, is that the court's finding was contrary to the weight of the evidence.

All the testimony in the case was taken before the court and it therefore had an opportunity to see and hear the witnesses and observe their demeanor. The opinion (Rec. pp. 32-43) of the trial court is an exhaustive and complete review of all of the voluminous testimony.

Under those circumstances, we submit that the finding of the trial court is final upon this appeal.

> Taylor v. Nevada Humboldt Tungsten Mines Company et al, (C. C. A. 9th Cir.) 295 Fed., 112-114;
> Unkle v. Wills, (C. C. A. 8th Cir.) 281 Fed., 29-36;
> Adamson v. Gilliland, 242 U. S. 350; 61 L. Ed. 356-357;
> Davis v. Schwartz, 155 U. S. 631; 39 L. Ed. 289-293.

DUNFEE TOOK JUNE 5, 1920, AND JANUARY 1, 1921, LEASES WITH KNOWLEDGE OF UNDER-GROUND CONDITIONS AC-

QUIRED BY HIM WHILE HE WAS ADMITTEDLY ACTING FOR COMPANY, AS TO WHERE GOOD ORE COULD PROBABLY BE FOUND BY FORTY OR FIFTY FEET OF WORK, AND HE ATTEMPTED TO UITILIZE THIS KNOWLEDGE FOR HIS OWN PROFIT. Admittedly Dunfee had actual charge of all mining operations. He was the miner, the man depended upon to get the ore, etc. On August 1, 1918, in a report to stockholders, (Rec. p. 80, Plaintiff's exhibit No. 3) Dunfee strongly advises shut-down until after the war on account of prohibitive costs consequent on war conditions. Dunfee in this report says:

> "The present prospects of the mine **are good** as on the 600 foot level . . . we have uncovered a fine body of ore running from \$45 to \$50 per ton in the better class of it with a larger amount of ore of \$15 to \$25 per ton."

Also in Dunfee's report of November 6, 1918, (Rec. p. 133, Defendant's exhibit "B") he says he knew the ore showing on six hundred foot level, because he advises extending drift on six hundred foot level **to the east.**

> "Indications are good for the shoot still to come in . . . found some very rich ore at bottom of winze. . . . The success of the mine in the future will require development to disclose the ore bodies that diligence and perseverance will no doubt discover."

On March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) Dunfee tells Terwilliger "I have looked the state over and there is a better chance on the Orleans than anything I saw. . . . The inducements are better now than ever before."

As we know there had been no work done since the shut-down in the Fall of 1918, and that Dunfee had not been on the ground for nearly a year before writing this letter, we know that whatever showing in the Orleans property he based the statements supra on, they were showings that he knew of at the time of the shut-down. Again, on August 31, 1918, just before the shut-down, (Rec. p. 88, Plaintiff's exhibit No. 6) Dunfee writes Terwilliger, "I am hurrying my work in my **east drift on the 600 level** as it looks like we have ore soon. . . . To-day I have one foot of $22 ore. . . . Do hope it widens." So in his letter of April 4, 1918, (Rec. pp. 91-92, Plaintiff's exhibit No. 8), he refers to ore showings in this same section of the mine, and says, "The future looks much brighter." On September 14, 1918, (Rec. p. 141, Defendant's exhibit "D") Dunfee writes Terwilliger, "I am drifting **east** on some ore. Hope of getting a shipping ore shoot. . . . Things look good for a shipping ore shoot."

Dunfee's Answer (Rec. p. 30) alleges that, after doing seventy feet of lateral work and twenty-four foot of raise **on six hundred level**, he encountered

the good ore which enabled him to sell the lease to D'Arcy for $40,000 cash and 150,000 shares of stock. His oral testimony shows he simply utilized his past knowledge of where to look for the good ore, that in 1918 was indicated as being east or southeast of the six hundred level workings, and in 1920 or 1921 Dunfee found it just as so indicated.

The case infra is in point. Discussing a similar situation, the Court said:

> "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one, who, in a fiduciary relation, **has acquired information concerning or interest in the business or property** of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been

betrayed may enforce the trust which arises under this rule of law although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and an employe, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation."

Trice et al v. Comstock et al, (C. C. A.) 121 Fed. p. 621-622-623.

The language of the Circuit Court of Appeals supra was quoted with approval by the Nevada Supreme Court and applied in a case involving mining property where the question arose under similar conditions as here.

Lind v. Webber, 35 Nev. 623. 50 L. R. A. n. s. 1046, Ann. Cas. 1916A, 1202.

DUNFEE AS DIRECTOR, PRESIDENT, TREASURER AND GENERAL MANAGER WAS FIDUCIARY IN HIGHEST DEGREE.

As squarely supporting the rule supra, see 14a C. J. p. 97, Sec. 1866, and notes.

The rule applies in all its force to officers of a corporation.

> 14a C. J. p. 99.
> 7 R. C. L. 456, Sec. 441.
> Commonwealth v. McHarg (C. C. A.) 282 Fed. 560-564.
> Jackson v. Luedling, 21 Wall. 616. 22 L. Ed. 492.

In the 282 Fed. supra is a discussion of the subject very applicable to the facts of this case.

Though Dunfee as Director, President, etc., was holding over that would not affect rule as to his duty to act with fidelity, etc. Officers of a corporation who hold over must perform their duties with the same degree of fidelity as regularly elected officers.

> Kinnard v. Ward (Cal.) 130 P. 1194-1195.

Mr. Pomeroy, in discussing the rule as applying to officers of a corporation and others obtaining for themselves renewal of leases on property used by the corporation, and holding that such lease enures

to the benefit of the company and is regarded as a continuation of or as grafted on the old lease, continues as follows:

> "This rule applies under every variety of circumstances, provided the rights of the other partners are still subsisting at the time when the renewal lease is obtained. It operates with equal force whether the renewal lease was to begin during the continuance of the firm or after its termination; whether the partnership was for an undetermined period, or was to end at a specified time, and the renewal lease was not to take effect until the expiration of that prescribed time; whether the landlord would or **would not have** by contract, custom, or courtesy, to a renewal of the original lease from the lessor; and even whether the landlod would or **would not have granted a new lease** to the other partners or to the firm. All these facts are wholly immaterial to the application of the doctrine, for its operation does not in the slightest degree depend upon the terms and provisions of the original lease, nor upon the attitude of the landlord. The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries, or who are in possession as tenants of premises in which their beneficiaries are interested. As this rule results from the relation of trust and confidence existing between the partners or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all

actual and quasi trustees, that a trustee, or person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any advantage or profit inconsistent with his supreme duty to his beneficiary."

3rd Pomeroy Eq. Jur., 4th Ed., Sec. 1050.

DUNFEE AND EDWARDS AS OWNERS OF STOCK CONTROL WERE TRUSTEES AND FIDUCIARIES OF PLAINTIFF AND OTHER MINORITY STOCKHOLDERS.

Admittedly Dunfee owned 300,000 shares and Edwards had 1,000 shares out of a total issue of 600,202 shares outstanding. Terwilliger had 267,000 shares and his Imperial Valley associates had 32,000 shares—a total of 299,000 shares. The complaint charges Dunfee and Edwards jointly with the acts complained of, but as Dunfee seems to have obtained for himself the fruits of the transaction complained of, plaintiff as a minority stockholder seeks to hold him as trustee.

"The rule of corporation law and of equity invoked is well settled and has been often pleaded. The majority has the right to control; but when it does so it occupies a fiduciary relation toward the minority; as much so as the corporation itself or its officers and directors."

Southern Pacific Co. v. Bogart, 250 U. S. 483. 63 L. Ed. 1099-1106.

See also Glengary Mining Co. v. Boehmer (Colo.) 62 P. 839.

Dunfee, as Director, President, Treasurer and General Manager, was trustee and prohibited from so dealing with property of Company as to place himself in an antagonistic position to other stockholders.

As squarely supporting the rule supra as applied to facts in principle identical with those involved in the case at bar, we cite:

Commonwealth v. McHarg (C. C. A.) 282 Fed. 560-563.
McCourt v. Singers-Biggar (C. C. A.) 145 Fed. 103. 7 Ann. Cas. 287.
Davis v. Hamlin (Ill.) 48 A. R. 541.

The two last cited cases supra involved attempt to take renewal of lease.

See also 7 R. C. L. p. 483, Sec. 464.
Morgan v. King (Colo.) 63 P. 416-421.
Glengary Mining Co. v. Boehmer (Colo.) 62 P. 839.

NON-OPERATING CORPORATION OR IN FAILING CONDITION — OFFICER OF, EQUALLY PRECLUDED FROM TAKING RENEWAL OF LEASE TO HIMSELF.

Dunfee's Answer (Rec. p. 22) avers that on and

after May 30, 1919, the Company was without assets or business and was to all intents and purposes dead. That it was without "assets" is unquestionably untrue, because we know from Dunfee's own report to stockholders (Rec. p. 80, Plaintiff's exhibit No. 3) the French Company had directed Edwards to extend the lease until June 1, 1920, and we know from Dunfee and his letters to Terwilliger that Dunfee had discovered indications to the east of the six hundred foot level workings that satisfied him that there was a rich shoot of ore there. We know from Edwards' letter (Rec. pp. 328-330-332, Plaintiff's exhibit No. 18) that the lease had in fact been extended by him to June 1, 1920, just as the French Company had directed him. So we know the Company had a valuable asset, one which a few years earlier plaintiff had paid $8,000 for a one-half interest in, and under which in less than two years' time the Company had taken out about $60,000 or $75,000 in ore, and under which Dunfee had previously taken out $85,000. Dunfee was confident (Rec. p. 133, Defendant's exhibit "B") of finding rich ore by drifting easterly on six hundred foot level; he was never discouraged, for on September 14, 1918, just before shut-down, (Rec. p. 141, Defendant's exhibit "D") he writes Terwilliger, "If we close down you and I will try outline a plan of action." On August 1, 1918, (Rec. p. 80, Plaintiff's exhibit No. 3), referring to proposed shut-down, Dunfee writes, "The present prospects of the mine

are good. . . . We have uncovered a fine body of ore running from $45 to $50 per ton in the better class of it with a larger amount ore of $15 to $25 per ton. . . . The deeper developments have been very encouraging."

On March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) Dunfee writes Terwilliger, "I have looked the state over and there is a better chance on the Orleans than anything I saw. . . . The inducement are better now than ever before."

A lease on such a property, equipped with hoist, blacksmith shop, etc., having at least a year to run, is a very substantial asset. But this is not all. The lessee has always an expectancy, hope or chance of obtaining a renewal, extension, etc., and this of itself is recognized by all the authorities as being a property right, and in this case we know from Edwards, the duly authorized agent and attorney-in-fact of the lessor company, from his letter (Rec. p. 330, Plaintiff's exhibit No. 18) that he would have granted the extension or renewal. The property was shut down in the Fall of 1918 because of extraordinary war conditions, and not because of any failure of the mine. Everybody, Dunfee included, fully intended to resume after war conditions eased up. The Company owed no debts, for Dunfee's report of November 6, 1918, (Rec. p. 132, Defendant's exhibit "B") says, "The mine is entirely free from

debt and no trouble can come from creditors as there are none." So also in Dunfee's report of August 1, 1918, re then contemplated shut-down (Rec. p. 79 Plaintiff's exhibit No. 3), Dunfee states, "We have succeeded at all times in paying the labor and running expenses of the company and are in good shape." When the property was shut down we know the mine was in good condition, and that the shut-down was due solely to excessive cost on account of war condition, and probably also in part to the shutting down of the mill of the Silver Corporation, where Dunfee was milling his ore, because on September 14, 1918, Dunfee writes Terwilliger (Rec. p. 141, Defendant's exhibit "D", "I am drifting east on some ore. Hope to get a shiping ore shoot. . . . Things look good for a shiping shoot."

The foregoing completely disproves Dunfee's allegation that Company had no assets on and after May 30, 1919. But for purpose of argument only, conceding that there was a rule that an officer of a moribund failing corporation may take renewal of lease on company property for himself, there is here no basis for application of such rule because of the facts supra. But no such rule exists in any event. The chance, hope or expectancy of lease renewal is itself **a property right**, and when corporation is failing, the duty of its officers to conserve its assets for creditors and stockholders, insteady of indulging in an unseemly scramble to appropriate

it for their own benefit, should in equity be all the stronger.

In the case infra, the Pike's Peak Co., being in the business of running an amusement resort, became involved in financial difficulties and was adjudicated a bankrupt. It had a lease which was practically its sole property. Defendant Pfuntner was a large stockholder, a director and general manager. A fire occurred which destroyed the resort. While Pfuntner was an officer and manager of the Company, he obtained from the lessor a lease of the property to take effect after the lease to the Company would expire. He did not notify any other officer of the Company of his intention so to do, and none of them were aware of his purpose. After they learned of his taking the renewal, the Directors demanded the renewal for the Company, and on refusal of Pfuntner suit was brought. The Court applied the rule holding that because of the fiduciary relations existing Pfuntner was held to the utmost fairness and honesty, that while the Company had no enforceable right to renewal of the lease yet there was an expectancy recognized by law as a valuable asset belonging to the Company, and that the law would not permit an officer to take it from the Company to whom he owes the duty of protection, and that he could not take it except with full knowledge and consent of his principal. Regarding the contention that the Company was in failing cir-

cumstances, without assets, etc., the Court said:

> "It is no defense for defendant Pfuntner that the Company for which he was acting was involved in financial difficulties and was adjudicated a bankrupt. This expectancy belonged not only to the tenants, but to those to whom the lease might be assigned. The original lessee and his assignees have continued to pay the rent, and the complainant, as we infer from the record, has rebuilt the structure at considerable expense. Pfuntner did not obtain this lease with the knowledge or consent of the party for which he was the agent, manager and a director. It follows that he holds the lease in trust for complainant."

Pike's Peak Co. v. Pfuntner (Mich.) 123 N. W. 17-21.
To same effect, 4 Fletcher Corp., Sec. 2285.
3 Cook Corp., 7th Ed., Sec. 660, note.
Idem, Sec. 653 and note 1.

The Hannerty case cited by counsel (Op. Br. p. 58) involved a very different situation from that in this case or in the Pike's Peak case supra and we think is not in point.

That the financial condition of the lessee company can make absolutely no difference as to application of rule, we cite the fact that the Courts go so far as to hold that **refusal** of owner to renew lease to original lessee does not affect application of rule that officer of corporation lessee cannot obtain renewal for himself.

McCourt v. Singers-Biggar (C. C. A.) 7 Ann. Cas. 296 note 298.

The reasonable expectancy of lessee in obtaining a renewal or extension of a lease is a property right, and a fiduciary or officer of corporation lessee may not take renewal to himself.

McCourt v. Singers-Biggar supra.
18th A. & E. E., 2nd Ed., p. 696.
Davis v. Hamlin (Ill.) 48 A. R. 541-544.
Robinson v. Jewett (N. Y.) 22 N. E. 224-226-227.

Under rule prohibiting officers of corporation and persons similarly situated from taking renewals of lease held by corporation, in their own name, it is immaterial that the lease had expired at the time the new lease was taken.

Edwards v. Lewis, 3 Atk. 538 (Old English case).
Hausuer v. Dahlmann, 45 N. Y. S. 1088-1090. Aff. 57 N. E. 1111.
Mitchell v. Reed (N. Y.), 19 A. R. 252 (Citing and quoting from English cases to point, see p. 257.)

And when partnership has been dissolved and one of former partners takes renewal of lease in his own name equity will hold it for the firm, as right or hope of renewal is deemed to be a graft upon or attached to original lease.

Johnson's Appeal, (Pa.) 2 A. S. R. 539-541.

DeBartleman v. Bessemer, (Ala.) 37 S. 511-514.

Dunfee as Director, President, General Manager, etc., in charge of operations, was under a duty to protect and conserve the Company's property, and this necessarily included obtaining or attempting to obtain an extension of the lease or renewal of it for the Company, and being under such duty he could not purchase or acquire such property for himself.

4 Fletcher Corp., Sec. 2285 and note 94.
3 Pom. Eq. Jur., 4th Ed., Sec. 1050.
Wheeler v. Abilene etc. Co. (C. C. A.) 159 Fed. 391-393-394.
Zeckendorf v. Steinfield (Ariz.) 100 P. 784-790.

Where managing director obtains a renewal of the company's lease on the premises used in the business, for himself, his failure to procure such renewal for the company when he could have done so at same rental, is a breach of duty.

4 Fletcher Corp., Sec. 2285 and n. 96.

Dunfee, being a fiduciary when new lease or leases were taken, his possession is deemed possession of the Orleans Mining & Milling Company.

Hoffman v. Reichart (Ill.) 37 A. S. R. 219-220
14a C. J. 121, Sec. 1889 and note.

LACHES IS FOUNDED ON INEXCUSABLE DELAY OF ASSERTION OF RIGHTS AS ONE ESSENTIAL ELEMENT.

Los Angeles to confer with me regarding the matter

Dunfee's defense of laches in plaintiff's assertion of rights cannot be based on **mere delay alone,** but it must be delay with **knowledge or notice of the facts** sufficient to cause an ordinarily prudent man to act. This as applied here means that before such defense can avail, it must appear that Terwilliger knew or at least had some sort of notice that Dunfee had not only taken the June 5, 1920, and the January 1, 1921, leases in his own name, **but was claiming adversely;** that he had repudiated the trust which equitably inhered in his office and which in absence of notice of facts to contrary, Terwilliger had right to rely on even if notice of mere fact of leases being taken had been brought home to Terwilliger. This must be so, because under the peculiar situation here the French Company seemed to have dealt with Dunfee. The lease of June 19, 1915, was in Dunfee's name, and it was continued in his name by extensions until June 1, 1920. The Company, while the equitable owner of the lease, does not seem to have had it formally assigned in writing or technically recognized by the French Company as the lessee. According to Dunfee's own letters, etc., they looked exclusively to Dunfee and even made it a proviso of renewing the lease that Dunfee be the manager of the property. Hence even if Terwilliger had known that Dunfee had obtained the June 5, 1920, and January 1, 1921, leases in his own name, this of itself would have been no notice to Terwilliger that Dunfee was claiming hostilely, as Terwilliger could and doubt-

less would have assumed, and rightfully so, that Dunfee was simply continuing the same method as had been employed in regard to the earlier extensions, and that the leases being in Dunfee's name meant nothing as between Dunfee and the Orleans Company so far as indicating adverse claim or repudiation of trust by Dunfee.

Therefore we say that before laches can be assigned, it was imperatively incumbent upon Dunfee to show not only that Terwilliger knew of his having taken these leases in his own name, but also knew that Dunfee intended to hold the leases for his **own benefit to the exclusion of the Company's rights.** But Dunfee, so far from not alleging notice to or knowledge of Terwilliger re Dunfee taking June5, 1920, and January 1, 1921, leases, gave no evidence on trial to the effect that Terwilliger had any notice or knowledge of such leases being taken, and still more fatal to Dunfee's case, he gave no evidence that Terwilliger knew anything whatsoever as to Dunfee's hostile attitude, adverse claim, repudiation of trust, etc. In addition to this, there is absolutely no allegation and no showing in evidence that Dunfee relied on or was misled by any non-action on the part of Terwilliger because Dunfee would first have to show notice or knowledge followed by non-action. That Dunfee did not know of Terwilliger's alleged talk with Mrs. Dunfee in the Summer of 1920 about the alleged Dunfee-McMahon

lease sale, is shown by Dunfee's own allegation (Rec. p. 28) where he says, referring to Terwilliger's letter of May 2, 1920:

> "That neither this defendant nor the Orleans Company ever thereafter heard from or of plaintiff or any of his said associates until after the consummation of the deal sought to be set aside in this action."

But even if Mrs. Dunfee's statement of her alleged talk with Terwilleger be all true, and even if she had in fact promptly communicated same to Dunfee, it would in no wise affect the case, because there was absolutely nothing in what Mrs. Dunfee claims she told Terwilliger that would put him on notice that Dunfee had even taken a new lease or that he **was claiming it for himself.**

To completely dispose of this laches defense, we call attention to fact that Dunfee when on witness stand was asked what it was that Terwilliger said or did that led him (Dunfee) to think Terwilliger had abandoned the business, and Dunfee stated it was Terwilliger's letter of May 2, 1920, (Rec. pp. 209-210, Plaintiff's exhibit No. 12). But this letter, so far from indicating any attitude of abandonment, is squarely to the contrary, because Terwilliger after explaining reasons for delay in answering Dunfee's letter of March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) says: "When will you be in

of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on."

The case infra was a joint adventure in mines, and laches was principal defense. The Court found appellant's alleged laches—i.e., his failure to furnish money, was due to his **want of notice or knowledge** that any money was required, and ruled against the defense.

Miller v. Walser (Nev.), 181 P. 437-444.

"It is an essential element of laches that the party charged with it should have had **knowledge** or the means of knowledge of the facts creating his right or cause of action—mere lapse of time, however long continued, will not bar the defrauded party's right to relief while he remains **ignorant of the fraud** and has no knowledge of facts which would lead a reasonably prudent man to discovery of it."

21 C. J. 244, Sec. 242 and n. 8 and 9 and cases cited.

"But a person is not required to exercise extraordinary diligence. If there is nothing to excite suspicion and no apparent reason for making investigation, a person is not negligent in failing to make inquiry. To charge a person with implied knowledge, the known facts must point with some directness toward the unknown— Want of knowledge may be accounted for by plaintiff's infancy —or absence from the community, and the confidential relationship between the parties also may be an excuse."

21 C. J. 248, Sec. 244.

See also idem p. 250, Sec. 249.

"Laches is a defense only when the stockholder, **with a full knowledge of the facts,** has delayed an unreasonable length of time in bringing his action. These two elements, **knowledge** and **delay,** are the essential elements of the defense. Until the stockholder has **full and complete knowledge of all the essential facts** which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence."

3 Cook Corp., Sec. 731.

Laches does not commence to run until the stockholder has discovered the facts.

Brinkerhoff v. Roosevelt (C. C. A.) 143 Fed. 478-480.

A delay of four years may be excused by the fact that the complaining stockholder did not know the facts until three months before he instituted suit.

Kessler v. Ensley Co. (C. C.) 129 Fed., 397-417 et sec.

The lapse of time without knowledge or means of knowledge is no bar.

Fox v. Robbins (Tex.) 62 S. W. 815.

"Constructive notice, however, does not apply to a case of fraud, and constructive notice cannot relieve the party from responsibility for a fraud. It is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge

merely because he might have ascertained the facts by an examination of the corporate books. Moreover, it is a well established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay."

3. Cook Corp., Sec. 731.

The foregoing disposes of Dunfee's contention (Rec. p. 26) that the fact of cancellation of lease was of record in the office of the Company in Goldfield, in the possession of defendant Edwards as Secretary, and his contention (Op Br. pp. 65-66) that Terwilliger was in some way under a duty to keep himself informed, and because he did not do so he is to be charged with constructive notice of what he could have learned had he gone to Goldfiefild and examined the records.

Further, in support of our contention, we cite:

Lind v. Webber, 36 Nev. 623. 50 L. R. A. n. s. 1046, Ann. Cas. 1916A, 1202.

"In the first place it may be stated that a person cannot be said to have been guilty of laches prior to the establishment of his right to sue. And on the same grounds the lapse of time may be excused where the plaintiff was unable, from the obscurity of the transaction, to obtain full information in regard to his rights—. In considering the question of laches, courts manifest the utmost leniency where it appears that the delay is due to the intimate personal relations subsisting between the parties and the high degree of confidence reposed by one in another."

10 R. C. L. 402, Sec. 149.

"It is therefore of the essence of laches that the

party whose delay is in question shall have been blameable therefor in the contemplation of equity, and accordingly it must appear that he had knowledge, actual or imputable, of the facts, which should have prompted a choice either diligently to seek equitable relief or thereafter to be content with such remedies as a court of law might afford; . . . Laches cannot be imputed to one who is innocently ignorant of his rights. . . . However, mere suspicions or random statements heard in public do not necessarily constitute notice; although, after a person's suspicions are reasonably aroused, it is his duty to investigate at once."

10 R. C. L. 405, Sec. 153.

"Acquiescence of plaintiff cannot be inferred from mere non-action where there was no occasion for an earlier assertion of his right."

21 C. J. 229.

So in reference to expenditures made by party asserting the defense, it will not avail where plaintiff had no knowledge that his rights were being invaded.

21 C. J. 232, Sec. 226 and n. 92.

DEFENSE OF ELECTION URGED ON TRIAL BY DUNFEE NOT AVAILABLE TO HIM.

Because the plaintiff joined the Orleans Hornsilver Company as defendant with Dunfee, and claimed relief against that Company which is urged (Op. Br. pp. 52-56) to be inconsistent with the relief claimed against Dunfee, the latter now claims plaintiff made an "election" of remedies and cannot recover herein on theory of Dunfee being a trustee; the precise point being, as we understand it, that the suit originally was to **recover the property in specie,** whereas by dismissing as to the Orleans

Hornsilver Company, we are now asking that Dunfee be adjudged a trustee of the **proceeds of such property.**

It is true that we alleged the Orleans Hornsilver Company took with notice, etc., and that we asked that its claim be decreed accordingly, but it is also true that in the prayer as a sort of alternative, we ask that it be decreed:

> "That in respect of all things done by said defendant Dunfee in the negotiating for or obtaining said lease, he acted as a trustee and for the use and benefit of said corporation."

Because Terwilliger prayed for certain relief against the Orleans Hornsilver Company, which relief is asserted by Dunfee to be inconsistent with the relief prayed for against Dunfee, it is said Terwilliger made an election to claim as against the Orleans Hornsilver Company and not as against Dunfee. But from this it would logically follow that the relief prayed for against Dunfee must be equally inconsistent with the relief prayed for against the Orleans Hornsilver Company, and it would then further follow that the Orleans Hornsilver Company could have claimed Terwilliger elected by asking that Dunfee be declared a trustee, and if such plea were sustained and Dunfee left as sole defendant, Dunfee could then say—as he in fact now does—

that because we prayed for inconsistent relief against the Orleans Hornsilver Company, we thereby made an election and are estopped from claiming against him, and the result would be that both defendants would be wholly released and plaintiff's cause of action, however meritorious otherwise, would be dismissed.

We say an election cannot be **predicted upon the prayer** but only upon the **facts relied on** for relief or as basis for recovery. The same **facts** remain in complaint now as when first filed, so far as Dunfee is concerned. There has been no shifting as to the facts constituting plaintiff's cause of action against Dunfee. But necessarily we must abandon the **prayer** insofar as the Orleans Hornsilver Company is concerned, because the allegations of fact as against the Orleans Hornsilver Company were not supported in evidence.

In case infra plaintiffs in their first complaint charged a conspiracy and asked for judgment for the contract price of certain goods, and prayed defendants be enjoined from transferring the property involved. Afterwards plaintiffs amended by praying judgment for damages on **substantially same facts.** The Trial Court apparently concluded that plaintiffs had by their first complaint elected to recognize contract as valid, and refused to allow

amendment asking for damages, but this was reversed, the Supreme Court saying:

> "It seems to us that, if the statements in said second amended petition were all true, the plaintiffs would be entitled to some relief, and that they were not entitled to the specific relief prayed for would not preclude them from introducing any evidence, or from receiving such relief as the evidence might show that they were entitled to . . . these two positions are not so inconsistent as, under the authorities hereinbefore cited, the election of one precludes the right to pursue the other. . . . However strongly a pleader may be bound, and however much he may be estopped, by the averments of **facts in the body** of his pleadings, it is doubtful whether he is bound or estopped by his **prayer for relief.** He is supposed to know the **facts** upon which he predicates his action, and to state them as he understands them; but the relief to which he is entitled on the facts related is a question for the court, and over which he has no control."
>
> King et al v. Gleason (Kans.) 51 P. 301-302.
>
> "The **prayer** for relief in a petition is not such an election as will preclude plaintiff from filing an amended petition urging substantially the same facts and asking a different relief."
>
> 20 C. J. 35.
>
> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

Lockhart v. Leeds, 195 U. S. 427-436; 49 L. ed. 263-269.

In the case infra the United States sued in equity to set aside a patent for fraud, alleging that defendant Debell had fraudulently induced the Secretary of the Interior to issue a patent to an Indian, and that Debell had then bought the land of the Indian for $2,000 when it was worth much more. Debell sold the land to one Butterfield, who was made a defendant with Debell. The prayer was that the patent and deeds be set aside, or if Butterfield was an innocent purchaser then that Debell be decreed to hold consideration received by him in trust. Butterfield was dismissed from the case and Debell urged that because the relief sought against him, viz: that he be decreed a trustee of proceeds of sale to Butterfield, was inconsistent with the relief sought as against Butterfield, viz: a cancellation of his deed, that the Government was barred. But the court ruled against the defense, saying:

> "that where the proof sustains the cause of action in equity, but the defendant has by his course of conduct rendered the appropriate relief first sought ineffective, the chancellor may require him to make compensation for his prevention of that relief. **Where the primary relief sought is the restoration of property** and the defendant has placed it beyond his and the court's reach, the court may require him to pay the value of the property, or the proceeds he received from

it, because the right to this relief inheres in and grows out of the equitable cause of action which the plaintiff has established. Moreover, the right to recover the proceeds springs from the immemorial jurisdiction of courts of equity to enforce trusts. One who by fraud or wrong acquires the property of another thereby becomes a trustee de son tort of that property, and holds it in trust for the owner. If he sells and conveys it the owner may successfully pursue him in equity as trustee for the property, or for the proceeds of it. If, therefore, the proof established the plaintiff's cause of action in equity against the defendant for the restoration of the land, he cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court."

United States v. Debell, et al, (C. C. A.) 227 F. 760-764.

We believe the case supra to be conclusive against Dunfee's defense of "election" in the instant case, because the facts and the prayer for relief in both cases are identical, except perhaps that there is a slight difference in the form of the prayer. We prayed for two forms of relief inconsistent with each other. So did the Government in the Debell case. We did not in so many words make express statement or ask for relief against Dunfee as an "alternative" in event we failed as against the Orleans Hornsilver Co. The Government in the Debell case did not ask for relief against Debell as an

"alternative" in event it failed as against Butterfield.

The case infra is very much in point, and in some respects it goes farther on point here considered than the case at bar. The United States sued in equity to cancel a patent to land issued to one Robertson, who later transferred to Frick. Robertson died. The plaintiff alleged the patent to Robertson had been obtained by fraud, in that knowingly false statements were made that there were no minerals on the land, and it was further alleged that the Frick deed from Robertson was taken with knowledge of the fraud. The relief specially prayed for was that the patent and deed be held void and the land returned to plaintiff as part of public domain, and then followed a general prayer for "such other or further relief as may accord with principles of equity." On the trial it developed for the first time that Frick had deeded the land to the California Door Company, who was an innocent purchaser, and thereupon Frick contended that the plaintiff having elected to claim cancellation of patent as its specific relief, was barred from pursuing him in equity as a trustee for the value of the property. The Court said:

"The case falls, I think, within the well-recognized exception that, where the facts are such as primarily to give equity jurisdiction of the controversy, and that jurisdiction has obtained, if an

act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court **will retain jurisdiction** to award money damages or **give such other relief as may be just in the premises.**

Such a case was Cooper v. United States, 220 Fed. 867, 136 C. C. A. 497 (decided by the Circuit Court of Appeals of this circuit), which in the circumstances is not to be readily distinguished from the present case. There the transfer of land was made after the suit brought, but before service, and the bill was amended to bring in the grantee as a party. It appearing at the trial, however, that the latter was a bona fide purchaser for value, and the fraud being established, the lower court awarded a decree against the party charged for the value of the land in damages; and the appellate court held that this relief, being within the issues, was properly awarded under the general prayer.

Another similar case is that of Johnson v. Carter, 143 Iowa, 100, 120 N. W. 322, where the court, in response to a similar objection, say:

'It would be a strange perversion of the spirit which pervades all rules of equity if, when a party who has been defrauded of his title to land brings the person who defrauded him into a court of equity, upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the title to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages.' "

United States v. Frick, et al (D. C.), 244 F. 574-579.

The above case was affirmed on appeal—Frick v. United States (C. C. A.) 255 F. 612.

Counsel says (Op. Br. p. 53) the remedies we

sought against Orleans Hornsilver Mining Co. and against Dunfee are not "alternative remedies." "Remedy" and "relief" are not one and the same thing. A "remedy" is usually a form of action, such as a case of conversion, replevin, damages, or the like. "Relief" is that which equity affords as compensation or reparation for an injury or wrong after the injured party has invoked a "remedy" by bringing an action in some form entitling him to "relief." "Remedy" is the vehicle upon which the litigant rides, and "relief" is the objective. But reverting to counsel's contention, we believe he is mistaken, for the reason that we had at least two, if not three, "alternatives"—viz: we could have sued the Orleans Hornsilver Mining Co. for a restoration of the property, or we could have ratified the sale and sued that Company for the value of the property, or we could have elected to treat sale to that Company as valid and sued Dunfee for proceeds, or as a still further alternative we could sue both the Orleans Hornsilver Mining Co. and Dunfee in one action and pray for relief in the alternative, just as we did do.

At page 54 Op. Br. counsel refers to some New York cases, which we will consider.

Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 A. S. R. 479, was an **action at law** where one White deposited $805.93 with the bank,

in trust for his wife, and obtained a passbook. White died shortly thereafter—on November 13, 1882—and one Flynn was appointed executor. The wife died December 18, 1882, and plaintiff Fowler was appointed executor of her will. On January 25, 1883, Fowler exhibited his letters and demanded payment of bank, and the bank told him to produce the pass-book. Flynn, the executor of the husband's will, had the pass-book and on January 29, 1883, he presented it with proof of his appointment as executor, and demanded and received payment of the $805.93. Thereafter Fowler demanded payment and was refused by bank on the ground it had paid the deposit to Flynn, who had the pass-book. Thereafter Fowler as executor sued Flynn for the money and obtained judgment, but being unable to collect he sued bank for making wrongful payment to Flynn after notice, etc., and the bank pleaded election by the suit and judgment against Flynn. The only excuse for bringing the second suit was that Fowler was unable to collect the judgment against Flynn. The court sustained the defense of election, and said:

"If the money had been absolutely the money of the plaintiff (Fowler), left on special deposit with the bank, then he could have pursued the money **wherever he could trace it without losing his remedy against the bank.** In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his

> remedies would be consistent, being based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds **wherever he can trace them,** so far as the law will permit him to do so, **without relieving the trustee.** All his remedies in such a case are consistent and based upon the same theory, to-wit: **a breach of trust.**"

The foregoing excerpt is squarely in point in support of plaintiff's position here, because Dunfee is charged as a trustee who disposed of trust property, and plaintiff as a beneficiary of the trust was attempting to pursue it after tracing it to the Orleans Hornsilver Mining Company, and the authority supra squarely holds that such action in such case does not relieve Dunfee, the trustee, because the entire proceedings are based upon the same theory, to-wit: a breach of trust.

Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 A. S. R. 803, cited by counsel, was also an **action at law.** Terry first sued Kipp and Munger in conversion for value of certain personal property. Thereafter he sued Munger alone for **damages** for converting the property, and the court held that by the first action plaintiff had ratified the sale to Kipp and Munger and he could not thereafter sue Munger for damages based on same facts. We do not dispute the correctness of such decisions, but

deny their application here.

Counsel also cites Gardner v. Ogden, 22 N. Y. 327, 78 A. D. 192, but that case instead of supporting Dunfee's contention here supports plaintiff's. Plaintiff Gardner, who resided in New York, owned some lots in Chicago and employed Ogden, Jones & Co., real estate agents in Chicago, to manage the property. The defendant Henry Smith and one Frank Hathaway were clerks in the Ogden Jones & Co. office. Smith and Hathaway by using the firm's letterheads and firm name, etc., fraudulently induced Gardner to sell the Chicago property to "Mr. Henry Smith" for $7500.00. The property was worth substantially more than $7500.00, and later plaintiff upon learning this sued Ogden and Smith, charging Ogden with fraud in selling the property for less than its value, and also claimed that Ogden was interested in the purchase. Plaintiff asked that the **deed to Smith be set aside** and that **Smith be compelled to re-convey**, or that Smith and Ogden pay the **highest price which the land had attained**. Plaintiff had judgment and both defendants appealed to appellate division of Supreme Court, which court reversed the judgment and ordered a new trial, and plaintiff Gardner then appealed from such order to the Court of Appeals, and that court held that the proof failed to show that Ogden was a party to the fraud or interested in the purchase, and affirmed the

judgment dismissing him but reversed the judgment of the intermediate Appellate Court granting a new trial as to Smith, and affirmed the judgment of the trial court as to defendant Smith, with costs, etc.

It will be noted in the case supra that the plaintiff there did substantially what the plaintiff did in the case at bar, alleged the facts constituting his remedy or cause of action, and then prayed for two forms of relief—one against Smith individually that the deed be set aside and Smith be compelled to reconvey, etc., or as a sort of an alternative that Smith and Ogden be in effect held as trustees and adjudged to pay the highest price which the land had attained.

In Seaman v. Bandler, 56 N. Y. S. 210, also cited by counsel, the plaintiff had sued one Wiener in an action **at law,** to-wit: in replevin, and **while that action was still pending and undetermined** plaintiff sued defendant Bandler **at law** for the price of the very goods embraced in the replevin suit.

At middle of page 3 (Rep. Br.) counsel says that no authority holds that estoppel is essential to render an election effective. This is not correct in our view as applied to elections in equity, and we again refer to 20 C. J. 25, where the text holds that where the victim of a wrong has inconsistent remedies he may "in the absence of facts creating an equitable

estoppel'' pursue any or all of them until he recovers through one.

See also to same point Union etc. Co. v. Drake (C. C. A.) 214 F. 536-548, cited and quoted page 50 our Op. Br.

But counsel says (Op. Br. p. 55) that Dunfee has suffered detriment constituting estoppel, to-wit: his expenditures in connection with this suit. Rarely, if ever, has a party been allowed to claim estoppel by matters connected with the identical suit in which the estoppel is claimed. Counsel says these expenditures were incurred in this suit "against the D'Arcy Company." But this suit is also against Dunfee, and Dunfee is simply defending himself and under the guise of estoppel is attempting to charge up his cost in establishing estoppel, and this too all in the same case. Why does counsel assume that this case is solely against the D'Arcy Company, when he must have known from the beginning that the case so far as D'Arcy was concerned was an alternative proposition under Federal Court Rule 25 above referred to? Clearly the action from the beginning was in the main and almost wholly **directed against Dunfee,** and since the opening of the trial and the dismissal of the Orleans Hornsilver Mining Company, **against him exclusively.**

Had we originally sued the Orleans Hornsilver

Mining Company alone and asked for cancellation, etc., and failed in that suit and then had sued Dunfee asking that he be charged as a trustee, there would have been some basis for the claim of election, though we deny that it would lie even then inasmuch as this is a pure suit in equity where the rule as to estoppel by election is substantially different from what it is in an action at law. But in such case if Dunfee had gone to substantial expense, etc., in assisting the Orleans Hornsilver Mining Company to defend itself against our supposed suit for rescission he might in the subsequent suit against himself claim election because of facts constituting estoppel. And that is the sort of expenditure in litigation referred to in the cases cited by counsel (Op. Br. p. 55).

While we do not deem it important, we insist that Dunfee's claim of election comes too late and that the rule is that it must be promptly pleaded and urged. Being a defense not favored in equity (Friederichsen v. Renard 247 U. S. 207, 52 L. ed. 1075-1083-1084) the party claiming it must assert it. The principle is the same as where a complaint discloses on its face that the cause of action is barred by the statute of limitations, it being nevertheless the duty of the defendant to affirmatively plead the defense. But counsel says (Op. Br. p. 56) that Dunfee made the defense as soon as it could be

raised, to-wit: immediately upon dismissal of the Orleans Hornsilver Mining Company. But the fact is that if Dunfee has a right to rely upon "election" at all, such right is in no sense dependent upon the dismissal or other disposition of the case against the Orleans Hornsilver Mining Company. Counsel is correct in saying that the "election" (if there was one) is shown by plaintiff's complaint. Hence Dunfee instead of answering to the merits and saying absolutely nothing about "election" in his answer, could have pleaded election in the answer which was filed many months prior to the trial and to the dismissal of the Orleans Hornsilver Mining Company. Had he done so, the point could have been raised on a motion to dismiss complaint. Plaintiff might thereby have been prepared to intelligently elect between pursuing the real wrong-doer and one charged with having possession of the fruits of the wrong. Dunfee's present proceeding, if successful, would constitute a trap whereby plaintiff after dismissing as to the Orleans Hornsilver Mining Company would, because of so doing be thrown out of court as to Dunfee, without any recourse of further pursuing the Orleans Hornsilver Mining Company.

It has always been the rule in equity that where plaintiff is in doubt whether upon the case made in his bill, he is entitled to one kind of relief or another, he may frame the prayer in the alternative, and the

court may grant the relief to which he is entitled under either alternative, so long as it is consistent with the facts alleged in the bill. Plaintiff may alleged a single state of facts and ask relief in alternatives which are directly opposite or inconsistent with each other.

As squarely supporting this we cite:

21 C. J. 406, Sec. 426 and notes and cases cited.

Equity Rule 25, specifying what a bill in equity shall contain, contains five sub-divisions, the fifth of which refers to the prayer, and reads:

> "5th. A statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms."

In the case infra, which was a suit in equity and involved so far as this point is concerned a similar situation, the Court said:

> "the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory."

Union etc. Co. v. Drake, (C. C. A.) 214 Fed. 536-548 and cases cited by the Court.

The case above, and others cited infra, go much further than necessary for the purposes of this case, because it will be noted that the rule is firmly established in the Federal Courts that inconsistent **remedies** may be prosecuted and unless there are **facts** estopping, the doctrine of election will not bar relief. In the case at bar it cannot be claimed that there are any **facts** estopping Terwilliger from claiming against Dunfee, such as that Dunfee has been misled to his prejudice, etc., by Terwilliger's prayer for relief against the Orleans Hornsilver Company.

In case infra plaintiff's bill was for cancellation of a contract and deed on ground of fraud. Defendants answered denying fraud. The case was referred to a Master, who found that plaintiff had been induced to enter on the contract by fraud of defendants, and also that plaintiff had taken possession of the land embraced by the contract and cut down considerable timber thereon after the contract attacked was made. The Court found that thereby plaintiff had ratified the contract, whereupon the case was transferred to the law side for damages on amended pleadings and plaintiff proved his case for damages, but defendants, treating transfer to law side and amendment of pleadings as equivalent to commencement of new action, urged that the equity suit for cancellation, being inconsistent with

action for damages, was an election and also relied on Statute of Limitations. The court said:

> "No matter what may be thought of the merit of the doctrine of election of remedies, it is a long observed and deeply intrenched rule of procedure. But, for obvious reasons, it has never been a favorite of equity and it has been specifically decided by this court that the two forms of relief pursued, before and after the amendment of the pleadings in this case, are not so inconsistent but that both may be prayed for in one bill in equity and either granted, as the evidence and the equities of the case may require. . . . At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended. . . . Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the circuit court of appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do."
>
> Friederichsen v. Renard, 247 U. S. 207, 62 L. ed. 1075-1083-1084.

The Supreme Court in the case supra reversed the judgment of the Circuit Court of Appeals, and also the District Court, for the error discussed.

The case infra was a stockholders suit involving many points common to case at bar. Bogert, as minority stockholder of Houston & Texas Central Railroad Company, complained that the Southern Pacific Company, a majority stock-owner, had dominated the business and property of the Houston Company for the benefit of the Southern Pacific Company by taking to itself a mortgage upon the assets of the Houston Company and having the property sold to satisfy the mortgage, pursuant to a re-organization scheme, whereby the Southern Pacific Company took all stock of re-organized company, leaving Bogert and other minority stockholders nothing. Bogert, on behalf of himself and other minority stockholders, first brought suits to have the mortgage foreclosure set aside as fraudulent, but these suits failed because unsupported by the facts, and later Bogert brought suit to compel the Southern Pacific Company to pro-rate the proceeds of such foreclosure proceeding so received by it with Bogert and other minority holders. The Southern Pacific Company squarely raised, among other defenses, the defense of election, but the court held against the defense, and said:

> "And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis." (Citing cases.)

Southern Pacific Company v. Bogert, 250 U. S. 483; 63 L. ed. 1099-1107.

We believe that the case supra is decisive against defendant's contention in the instant case, not only on this point but on a number of other points to which the case supra is elsewhere herein cited.

See also Davis v. Berry, (C. C.) 106 Fed. 761-762.
Jones v. Missouri etc. Co., (C. C. A.) 144 Fed. 765-779.
Standard Oil Co. v. Hawkins, (C. C. A.) 74 Fed. 395-398.

An attempt to collect a claim against an assignee by a proceeding against the funds, is not inconsistent with an action to enforce the personal liability of the assignor.

20 C. J. 19, Sec. 15.

In the case infra plaintiff alleged fraud in obtaining a title bond to land, and prayed that bond be cancelled and to have an accounting of rents and profits which purchaser of land had received. On final hearing plaintiffs were permitted to amend by asking in the alternative for a decree for the balance of the purchase money to be paid according to such title bond, and that such balance be decreed a lien on the land, as security for its payment. It was

held there was no new case or inconsistency in the remedy; that the alternative prayer only enabled the court to adapt its relief to the case made by the bill and sustained by the proof. The Court said:

> "It is a well settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied another may be granted, the relief of each kind being consistent with the case made by the bill. . . . Under the liberal rules of chancery practice which now obtain, there is no sound reason why the originall bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the land for unpaid purchase money."
>
> Hardin v. Boud, 113 U. S. 713; 28 L. ed. 1141-1143.
>
> "The seller in a contract of conditional sale does not, by instituting proceedings to enforce a material man's lien, based upon the mistaken theory that the title is passed to the purchaser, make an election which prevents him from bringing suit in replevin based on the theory that title still remains in the seller."
>
> Bierce v. Hutchins, 205 U. S. 340; 51 L. ed. 828-833.
>
> "The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer."
>
> Thomas v. Sugarman, 218 U. S. 129; 54 L. ed. 967-969.

"So the prosecution of a misconceived and unmaintainable action or defense against one person does not preclude an inconsistent action against another. The act of a secured creditor in proceeding against his debtor to enforce payment of a just claim is not in any manner inconsistent with his pursuit of any proper remedy against a third person who wrongfully converts or destroys his security."

20 C. J. 18 and notes 18 and 19.

"Where the victim of a wrong has at his command inconsistent remedies and he is doubtful which is the right one, in the absence of facts creating an equitable estoppel, he may pursue any or all of them until he recovers through one, since the prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one."

20 C. J. 25.

In case infra plaintiff sued in equity to rescind an agreement for misrepresentation and fraud, and this suit was dismissed on its merits. Thereupon plaintiff sued to recover $10,000 as purchase price fixed by the agreement sought to be cancelled in the dismissed equity suit. It was contended the equity suit was an election, that the remedy there sought was the cancellation of the instrument, whereas in the subsequent suit the remedy was by way of affirmance of same. The Court said:

"It is contended that by the institution and prosecution of this suit in equity the plaintiff irrevocably elected to rescind the contract, and thereby estopped himself from maintaining this action

to enforce it. But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had an existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake." (Citing cases.)

Barnsdall v. Waltemeyer, (C. C. A.) 142 Fed. 415-420.

To same effect: Harrill v. Davis, (C. C. A.) 168 Fed. 187-195.

In re Stewart, (D. C.) 178 Fed. 463-468.

Nauman Co. v. Bradshaw, (C. C. A.) 193 Fed. 350-354.

In this case the defense of election was not pleaded by Dunfee or in any manner suggested by him until at close of plaintiff's case he moved for a dismissal. The rule is well established that such defense, to be available, must be pleaded. And it will not answer to say that because here the facts relied on for the defense were not de hors the complaint, therefore no plea was necessary, because if the plea were seasonably made the complainant might amend, or the like, so as to avoid anything subsequently occurring upon which estoppel might be based in favor of defendant. This because of the ruling supra that in the absence of facts constituting estoppel the Federal Courts do not recognize the defense of election to any case where plaintiff mistakenly pursues one remedy, even to defeat, and then adopts another one that might be carried to victory.

"An election of remedies being an affirmative

defense, it must be pleaded in order to be available. Such plea should show that the remedy first sought was an available remedy as otherwise no election is shown."

20 C. J. 37, Sec. 32.

See also World's Fair Mining Co. v. Powers, 224 U. S. 173; 56 L. ed. 717-721.

JUDGMENT IS NOT EXCESSIVE

Appellant complaints (Op. Br. p. 51) that the Judgment is excessive. The Complaint alleges (Rec. p. 11-12) that Dunfee assigned lease

> "in consideration . . . that said Orleans Hornsilver Mining Company pay to said defendant, Dunfee, in installments from time to time an aggregate of $50,000 in cash and 150,000 shares of its capital stock."

Dunfee's Answer (Rec. pp. 25-26) admits the foregoing, except as to the amount of the cash consideration which he says was $40,000 instead of $50,000, viz:

> "Denies that the consideration for said assignment was or is the sum of $50,000 or any sum of money in excess of $40,000."

The Judgment is for $40,000.00, just as admitted by Dunfee. We fail to see how Judgment can be claimed excessive when it conforms to the facts established by the pleadings.

ORLEANS MINING AND MILLING COMPANY, THE CORPORATION IS PARTY BENEFICIALLY INTERESTED, AND THE REAL PLAINTIFF—HENCE NO ERROR IN JUDGMENT RUNNING TO "PLAINTIFFS."

In Op. Br. p. 51, it is urged that Judgment is erroneous in running to "plaintiffs" instead of the corporation Orleans Mining and Milling Company, for whose use and benefit the action is prosecuted.

The "plaintiffs" are "C. A. Terwilliger, on behalf of himself and all other stockholders of the Orleans Mining and Milling Company, a corporation, similarly situated." Hence, in adjudging in favor of "plaintiffs" the Judgment runs to plaintiffs in the exact character and capacity in which they sue. Unquestionably the plaintiffs' recovery is the property of the corporation because they sue as stockholders for the use and benefit of all stockholders, i.e., the corporation itself. If it appears that the award is made to "plaintiffs" in their capacity and character as stockholders suing for the use of all stockholders similarly situated, the beneficial ownership is in the corporation and we submit that is all that equity requires. The Judgment simply awards recovery to "plaintiffs" as stockholders suing on behalf of all stockholders similarly situated, and "all stockholders" necessarily comprise the corporation itself.

But we submit that in any event the error, if it be one, is super-technical and does not constitute reversible error because in the first place, no substantial right of appellant is or can be affected, and in the second place, the lower court, either by direction of this court, or by motion, or of its own motion, could reform or correct the record by having the Judgment run to the corporation.

JUDGMENT IS NOT ERRONEOUS IN NOT ALLOWING DUNFEE FOR HIS RISK, TIME, LABOR OR EXPENSE

Appellant now claims (Op. Br. p. 52) that Judgment should be reversed because it did not allow anything to Dunfee for his risk, labor, expense, etc., in connection with the lease transaction. Two cases are cited but we fail to find anything whatsoever in either in support of the claim.

No plea of counter-claim, recoupment, or the like was made by Dunfee for value of his alleged time, labor or expenditures. No claim therefor was made in the testimony and neither is there any evidence of amounts or values upon which any allowance could be based.

Further, Dunfee is a stockholder of the Orleans Mining and Milling Company and when the 150,000 shares of stock and the $40,000.00 is paid into the

company's treasury Dunfee can then make claim and recover against the company for the value of his time, labor and expenditures in the obtainment of the lease. He must first account and pay over the trust stock and money to his fiduciary.

Further, the rule is well established that a fraudulent grantee is not entitled to pay for services performed by him in looking after the property while it was in his possession.

Niday v. Graef, (C. C. A. 9th Cir.) 279 Fed., 941-944.

Nor for improvements.

Blank v. Aronson, (C. C. A. 8th Cir.) 187 Fed., 241-246.
9 C. J., 1267-1268 and N. 69.

The findings, being each and all supported by credible evidence, there can be no "obvious mistake of fact" and we say appellant has not pointed out any error whatever in the application of the law to the facts as found by the trial court and the case is thus squarely within the general rule firmly established that this court will not disturb the findings or the judgment of the trial court.

DATED: Reno, Nevada, October ...., 1926.

Respectfully submitted,
H. R. COOKE and
(COOKE & STODDARD on Brief),
Attorney for Appellees.